Note

JOHN D. KESSELRING*

Oregon's Recreational Immunity in the Wake of *Coleman v. Oregon Parks and Recreation Department*

* J.D. Candidate, University of Oregon School of Law, 2011. B.S., Business Administration and Journalism, University of Oregon, 2002. Senior Associate Editor, *Oregon Law Review*, 2010–11. University of Oregon School of Law Moot Court Board, 2009–11. Garland Dave Hunter Scholarship Recipient, 2009–10. Edith Durgan Memorial Scholarship Recipient, 2010–11. Special thanks to Professor Caroline Forell for advice and guidance. I would also like to thank my loving wife, Emily; my parents, Carol and Bud; and my siblings for their unconditional support and never-ending belief in me. Finally, I would like to dedicate this Note in loving memory of my sister, Pamela Sue Paola.

The focus on minimizing liability is a growing trend in our society. For some products, simple warnings or safety devices are enough to offer protection to the manufacturer. For other items, such as real property, minimizing potential liability can be extremely difficult or impose substantial cost on the landowner. What happens if you allow a person to use your land for recreational purposes and he or she is injured in the process? Who is liable for the injury? Should the landowner be held responsible? Does it matter whether the person using the land paid the landowner for such use? These questions present an important issue, one the Oregon Legislature sought to address.

In 1995, the Oregon State Legislature established a set of statutes giving rise to a recreational immunity for landowners. These statutes functioned to grant public and private landowners immunity from claims in tort or contract that arise from recreational use of land[1] when the landowner has not charged for permission to use its land.[2] In support of these statutes, the legislature explicitly provided that it is

[1] OR. REV. STAT. § 105.682(1) (2005) (amended 2009).

[2] OR. REV. STAT. § 105.688(2)(a) (2005) (current version at OR. REV. STAT. § 105.688(2)(b) (2009)).

the public policy of the state to encourage landowners to allow public access to their land for recreational purposes by limiting landowner liability to users of their land for such recreational purposes.[3]

On September 24, 2009, the Oregon Supreme Court held four-to-three in *Coleman v. Oregon Parks and Recreation Department* that the State of Oregon was not able to invoke the recreational immunity provided under ORS 105.682(1) to defend against an action by a person who was injured while using state land for which a fee was imposed.[4] The particular parcel of state land upon which the plaintiff was injured contained two areas, one requiring payment of a usage fee and another that was open to use by the public without charge.[5] The Oregon Supreme Court noted that both areas were contained in the same undivided parcel.[6] As such, a fee to use one portion precluded invocation of the immunity for the entire parcel.[7] The court's holding reversed the Oregon Court of Appeals' affirmation of the trial court's grant of summary judgment for the State.[8]

The court's holding in *Coleman*, that a fee charged to use one portion of a parcel of land constitutes a waiver as to the entire parcel, is troubling because it could create anomalous results and leaves significant ambiguity regarding clearly divided-parcel cases and what constitutes a usage fee.

This Note discusses *Coleman*, analyzing the majority and dissenting opinions and the implications of the court's holding. To this end, Part I discusses the statutory law that provides the background for the present case. Part II discusses statutory interpretation under Oregon law. Parts III and IV discuss the facts of the case and the procedural history, respectively. Part V discusses the court's holding and the rationale provided by both the majority and dissenting opinions. Finally, Part VI discusses the implications of the two rationales and the issues that may arise from the court's decision.

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3 OR. REV. STAT. § 105.676 (2005) (amended 2009).

4 *Coleman v. Or. Parks & Recreation Dep't*, 347 Or. 94, 104, 217 P.3d 651, 656 (2009).

5 *See id.* at 96, 217 P.3d at 652.

6 *Id.* at 103–04, 217 P.3d 656.

7 *See id.* at 102, 217 P.3d at 656.

8 *Id.* at 104, 217 P.3d at 656.

I
BACKGROUND LAW

The decision in *Coleman* places critical importance on the Oregon Supreme Court's interpretation of applicable Oregon statutes. Three statutes were implicated in this case: ORS 105.682(1), former ORS 105.688(2)(a), and ORS 105.672(1). This Note will use the statutory language in effect in 2005, as it was the law when the accident occurred and was the law the court applied. While these statutes were originally adopted in 1995 and have been revised as recently as 2009, some undergoing multiple alterations during this fifteen-year period, amendments adopted after 2005 are not materially relevant to the issues decided in *Coleman*. Additionally, these statutes have not been previously interpreted by a court under similar facts.

A. Statutes Establishing Recreational Immunity

1. ORS 105.682: Liability of Owner of Land Used by Public for Recreational Purposes, Woodcutting, or Harvest of Special Forest Products

ORS 105.682(1) creates the "recreational immunity" for landowners, which states that an "owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes, . . . when the owner of land either directly or indirectly permits any person to use the land for recreational purposes."[9] However, the statute conditions invocation of the immunity by further stating that "[t]he limitation on liability provided by this section applies if the principal purpose for entry upon the land is for recreational purposes."[10] Finally, the statute indicates the immunity "is not affected if the injury, death or damage occurs while the person entering land is engaging in activities other than the use of the land for recreational purposes."[11]

Considerable case law exists regarding ORS 105.682, but much of it discusses liability for a landowner's failure to warn of a danger. One particularly interesting interpretation of the law can be found in *Liberty v. State*, where the court held that the immunity does not apply to landowners of one parcel who allow passage on their land to

[9] OR. REV. STAT. § 105.682(1) (2005) (amended 2009).

[10] *Id.*

[11] *Id.*

access the land of another where the second parcel was used for recreational purposes.[12] In *Liberty*, the Oregon Supreme Court held that, despite the fact that the first parcel was used to reach the second parcel, which was to be used for a recreational purpose, using the first parcel to reach the second was not a recreational use of the first parcel.[13] Therefore, the immunity would not apply to the landowner of the first parcel.[14]

2. ORS 105.688: Applicability of Immunities from Liability for Owner of Land; Restrictions

ORS 105.688(2)(a) limited the immunity provided in ORS 105.682(1) by precluding application of the immunity in cases where the landowner charged a fee to use the land. The statute declares that the immunities provided by ORS 105.682 apply only if "[t]he owner makes no charge for permission to use the land."[15] While "charge" is a defined term under ORS 105.672(1), the meaning of "the land" is less than obvious. The meaning of "the land" is critical because it determines how far the immunity extends. Does the immunity apply only to the specific portion of the land where the recreational activity for which the fee was paid was taking place? Does it apply to all of the land contained within that particular parcel? Unfortunately, there is limited case law interpreting this statute.

3. ORS 105.672: Definitions for ORS 105.672 to 105.696

ORS 105.672(1) provides the definition of "charge" as it is used in ORS 105.688(2)(a), explaining that "'Charge' [m]eans the admission price or fee asked by any owner in return for permission to enter or go upon the owner's land."[16] Although ORS 105.672(1) seeks to define "charge," some uncertainty remains. What constitutes a "fee"? Does a fee charged for a permit entitling the holder to use multiple parcels constitute a fee to enter or go upon any of the individual parcels? As highlighted previously, how is "the land" defined? The definitions of these critical terms could quite easily be the dispositive factor in

12 Liberty v. State, 342 Or. 11, 21, 148 P.3d 909, 914 (2006).

13 *Id.* at 21–22, 148 P.3d at 914.

14 *Id.* at 22, 148 P.3d at 914.

15 OR. REV. STAT. § 105.688(2)(a) (2005) (amended 2009).

16 OR. REV. STAT. § 105.672(1) (2005) (amended 2009).

determining the outcome of an action. Again, case law discussing this statute and the meaning of these terms is sparse.

These three statutes seemingly address the issues presented in this case. However, despite the apparent clarity of the statutes, the present case illustrates that there is considerable ambiguity in terms such as "charge," "the land," and "recreational purposes." Despite the court's best efforts, much of this uncertainty appears to remain. This ambiguity is explored further in Part VI, the implications section of this Note, following the discussion of the majority and dissenting opinions.

II
STATUTORY INTERPRETATION

Statutory interpretation is a critical issue in *Coleman*. Statutory interpretation is the process of interpreting legislation to decipher legislative intent. While this process establishes what the court believes to be the legislature's intent, it is an inherently messy area of the law. Any case involving a statute requires some level of statutory interpretation; however, determining legislative intent can be a challenging proposition. The Oregon Supreme Court attempted to provide guidance in *Portland General Electric Co. v. Bureau of Labor & Industries* (*PGE v. BOLI*) by indicating that it is a court's responsibility to discern the legislature's intent.[17] To facilitate such analysis, the court established a three-step process.[18]

The first level of analysis begins with an examination of the text and context of the statute.[19] The text of the statute is the starting point and provides the best evidence of legislative intent.[20] In conducting the textual analysis, the court should apply rules of statutory construction found in statutes and case law, including rules like not inserting what has been omitted or omitting what has been inserted[21] and "words of common usage typically should be given their plain, natural, and ordinary meaning."[22] The court must also

[17] Portland Gen. Electric Co. v. Bureau of Labor & Indus., 317 Or. 606, 610, 859 P.2d 1143, 1145 (1993), *superseded by statute*, OR. REV. STAT. § 174.020, *as recognized in* State v. Gaines, 346 Or. 160, 171-72, 206 P.3d 1042, 1050-51 (2009).

[18] *Id.* at 610–12, 859 P.2d at 1145–46.

[19] *Id.* at 610, 859 P.2d at 1146.

[20] *Id.*

[21] *Id.* at 611, 859 P.2d at 1146 (citing OR. REV. STAT. § 174.010 (2005)).

[22] *Id.*

consider the context of the statute, "includ[ing] additional provisions of the same statute and other related statutes."[23] Similar to the textual analysis, the court must apply rules when analyzing the statute's context.[24] Some such rules include "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all,"[25] that "a particular intent shall control a general one that is inconsistent with it,"[26] that "use of a term in one section and not in another section of the same statute indicates a purposeful omission,"[27] and that "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute."[28] If the legislature's intent is clear from the first level of the analysis, no further inquiry is required.[29]

The second level of analysis is only used when the first level does not provide a clear understanding of legislative intent.[30] In the second level, the court examines legislative history to help determine legislative intent.[31] The court must combine the understanding derived from reviewing the legislative history with the insight gained from the first level analysis to determine legislative intent.[32] If the legislature's intent is clear after the second level analysis, the inquiry stops.[33]

Where the legislative intent is still unclear after the second level analysis, the court must apply the third and final analysis.[34] Under the third level analysis, the court applies general maxims of statutory construction to resolve remaining uncertainty.[35] An example of such a maxim is that where legislative history does not exist, "the court

[23] *Id.*

[24] *Id.*

[25] *Id.* (quoting OR. REV. STAT. § 174.010 (2005)).

[26] *Id.* (quoting OR. REV. STAT. § 174.020 (2005)).

[27] *Id.* (citing Emerald People's Util. Dist. v. Pac. Power & Light Co., 302 Or. 256, 269, 729 P.2d 552, 560 (1986)).

[28] *Id.* (citing Or. Racing Comm'n v. Multnomah Kennel Club, 242 Or. 572, 584, 411 P.2d 63, 68 (1966)).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 611–12, 859 P.2d at 1146.

[32] *Id.* at 612, 859 P.2d at 1146.

[33] *Id.*

[34] *Id.*

[35] *Id.*

will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue."[36]

By its very nature, the process of statutory interpretation is extremely subjective, making determination of what was intended by the legislature highly dubious and open to debate. This debate lies at the heart of the present case, with the majority holding that the statutes' references to "the land" refer to the entire parcel of land and the dissent arguing that "the land" refers to a specific portion of the land contained within the parcel.

III

FACTS OF THE CASE

Bradley and Bonnie Coleman were visiting William M. Tugman State Park (Tugman Park) along the Oregon coast.[37] The state imposes a fee to camp at Tugman Park, but it does not charge to enter the park or to use the park's trails.[38] On the day the incident occurred, Mr. Coleman was staying overnight in the campground.[39] While riding his bike on an established trail, Mr. Coleman rode across a bridge that did not have a ramp on the other side.[40] Because of the missing ramp, Mr. Coleman fell and was injured.[41]

The Oregon Court of Appeals described the accident in very general terms, as did the majority opinion of the Oregon Supreme Court. The opinions of these courts state that "[a]fter arriving at the park, [Mr. Coleman] and a friend decided to explore the park on their mountain bikes. While on a designated trail, [Mr. Coleman] rode over the end of a bridge that lacked a ramp on one side, crashed his bike, and broke his neck."[42]

The dissenting opinion of the Oregon Supreme Court provides a more vivid picture of the events that transpired. The dissent described the facts surrounding the accident in much greater detail, stating that, after arriving at the park and drinking beer, Mr. Coleman and a friend

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36 *Id.* at 612, 859 P.2d at 1147.

37 Coleman v. Or. Parks & Recreation Dep't, 221 Or. App. 484, 486, 190 P.3d 487, 488 (2008), *rev'd*, 347 Or. 94, 217 P.3d 651 (2009).

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

started to explore the park on their mountain bikes.[43] They rode down a well-defined wood chip trail and came to a bridge that did not have a ramp on the end from which they approached.[44] They lifted their bikes onto the bridge and rode across, continuing up the trail another quarter mile at which time they turned around and headed back toward the bridge.[45] Mr. Coleman rode his bike back across the bridge and off the other side, falling in the process and causing himself serious injury.[46]

The dissent's detailed characterization of the facts surrounding the accident highlighted the fact that Mr. Coleman drank beer prior to his bike ride and that he was aware, well in advance of his injury, that the bridge lacked an appropriate ramp on one side. In so doing, it appears that the dissent tried to establish that the trail was in otherwise good condition, and, regardless of the trail's condition, that Mr. Coleman had actual notice of the danger and may have exhibited comparative negligence to some degree. It is unclear from the facts whether Mr. Coleman was intoxicated to the point that his judgment was affected, but it is clear that the dissent found his alcohol consumption and knowledge of the existence of the danger to be of some importance.

IV
PROCEDURAL BACKGROUND

A. Trial Court

1. Arguments Before the Trial Court

At trial, the plaintiffs alleged that it was negligent for the State to leave a two-and-one-half-foot drop-off at the end of the bridge, to leave a bridge open to the public while in that condition, and to fail to warn the public of the dangerous condition of the bridge.[47]

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43 Coleman v. Or. Parks & Recreation Dep't, 347 Or. 94, 105, 217 P.3d 651, 657 (2009) (Balmer, J., dissenting).

44 *Id.*

45 *Id.*

46 *Id.*

47 *Coleman*, 221 Or. App. at 486–87, 190 P.3d at 488. In addition to the negligence claims, Mrs. Coleman also alleged loss of consortium resulting from Mr. Coleman's injuries. *Id.* at 487, 190 P.3d at 488. The State contended that Mrs. Coleman's loss of consortium claim was barred because she did not provide proper notice to the State apprising them of her intent to assert the claim. *Id.* at 487 n.2, 190 P.3d at 488 n.2. The trial court found the State's argument persuasive and granted the State's motion for summary judgment with regard to the loss of consortium claim. *Id.*

The State's theory of the case had two bases in support of its motion for summary judgment: recreational immunity and discretionary immunity.[48] First, the State contended that the recreational immunity applied, effectively shielding the State from liability on the claims.[49] The State argued that the immunity statutes applied because the fee charged for the Colemans to camp did not constitute a "charge for permission to use the land" under ORS 105.688(2)(a).[50] The State alleged that if "the public is permitted to enter or go upon the land without paying a fee, no 'charge' is imposed."[51] The State then reasoned that the immunity must apply because there was no "charge" to enter or go upon the land.[52] The State further argued that this remains the case even if a fee is imposed thereafter for engaging in a specific recreational activity on the land.[53] Essentially, the State's position was that, because a person could use the park without incurring a fee, there was no charge to "enter or go upon the land." Further, any fee subsequently imposed for camping still did not constitute a charge to "enter or go upon the land" because entry was free; it was only a particular use of the land once entry was made that resulted in a fee.

The plaintiffs opposed the motion, adopting the opposite position that the fee charged for camping "satisfied the definition of a 'charge for permission to use the land.'"[54] In response, the State asserted that the plaintiffs' construction of ORS 105.688(2)(a) "ignores the . . . definition of 'charge.'"[55] Additionally, the State made the alternative argument that immunity is retained "unless the injury arises out of the particular use for which the fee is charged."[56]

The State's second contention was that the decisions regarding the maintenance of the bridge were discretionary and, as such, were afforded discretionary immunity.[57] Discretionary immunity provides that public bodies and their officers, employees, and agents are immune from liability for "[a]ny claim based upon the performance of

[48] *Id.* at 487 & n.2, 190 P.3d at 488 & n.2.

[49] *Id.* at 487, 190 P.3d at 488.

[50] *Id.*

[51] *Id.* at 489, 190 P.3d at 489.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 487, 190 P.3d at 488.

[55] *Id.* at 489, 190 P.3d at 489.

[56] *Id.* 489 n.4, 190 P.3d at 489 n.4.

[57] *Id.* at 487 n.2, 190 P.3d at 487 n.2.

or failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."[58]

2. Trial Court Holding

Judge Richard L. Barron of the Coos County Circuit Court granted the State's motion for summary judgment with respect to recreational immunity, dismissing the complaint.[59] The trial court did not consider the discretionary immunity defense because the court was able to dispose of the complaint on the recreational immunity basis.[60]

B. Oregon Court of Appeals

On appeal, the court of appeals discussed the immunity provided under ORS 105.682 and the public policy rationale for its recognition. Ultimately, the decision of the court of appeals hinged on the meaning of ORS 105.688(2)(a). After undergoing an extensive statutory construction analysis, the court of appeals affirmed the trial court's decision.[61] The court reasoned that, "unless the state impose[d] a 'charge for permission to use' Tugman State Park within the meaning of ORS 105.688(2)(a), the state" would be afforded recreational immunity.[62] The statute provides that "charge" is defined as "the admission price or fee asked by any owner in return for permission *to enter or go upon* the owner's land."[63] The court's analysis required giving meaning to the definition of "go upon."[64] The plaintiff asserted that the State's fee to camp constituted a charge to go upon the land of the State.[65] In giving effect to the term "go upon," the court turned to *Webster's Third New International Dictionary* to define the terms "go" and "upon."[66] The court found that "[g]o . . . means 'to move on a course : pass from point to point or station to station; . . . to be in motion.'"[67] The court further determined that

[58] OR. REV. STAT. § 30.265(3)(c) (2005).

[59] *Coleman*, 221 Or. App. at 487, 190 P.3d at 487.

[60] *Id.* at 487 n.2, 190 P.3d at 487 n.2.

[61] *Id.* at 490–92, 190 P.3d at 490–91.

[62] *Id.* at 489, 190 P.3d at 489.

[63] *Id.* (quoting OR. REV. STAT. § 105.672(1) (2005)).

[64] *Id.* at 490, 190 P.3d at 490.

[65] *Id.*

[66] *Id.*

[67] *Id.* (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 971 (unabr. ed. 2002)).

"[u]pon" generally "means 'on' and 'on' ordinarily is 'used as a function word to indicate position over and in contact with that which supports from beneath.'"[68] The court concluded that "to 'go upon the land' means to move on a course over or in contact with the land."[69]

Next, the court determined whether the fee charged was to "go upon" the State's land.[70] Armed with this definition, the court considered whether the fee for camping was "a fee to move on a course over and in contact with the land, as [Mr. Coleman] was doing when he was injured."[71] The court found that the public may go upon the entire parcel of land comprising the park and that the payment of the fee was required only to partake in a specific activity upon a certain portion of the land.[72] The court concluded that "the fee merely entitles a member of the public to do something on the land while moving about on the land that another may not do."[73] The court held that, because the fee charged is only to participate in an activity upon the land and not "to enter or move on a course over and in contact with the land," the landowner has not charged for use of the land under the terms of the statute.[74]

C. Oregon Supreme Court

On appeal to the Oregon Supreme Court, the majority described the plaintiff's position as asserting that camping is "a 'recreational purpose' under ORS 105.672(5)."[75] The court found that the plaintiffs asserted that, when a landowner charges for use of any aspect of the land, the landowner has required payment "for permission to use the land" and, therefore, is not immune from liability.[76] The necessary implication of this assertion is that, "when the landowner imposes any charge to use the land, the landowner no longer is making its land available for the public's recreational use without payment."[77]

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[68] *Id.* (citation omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2517, 1574 (unabr. ed. 2002)).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 490–91, 190 P.3d at 490.

[72] *Id.* at 491, 190 P.3d at 490.

[73] *Id.*

[74] *Id.*

[75] Coleman v. Or. Parks & Recreation Dep't, 347 Or. 94, 99, 217 P.3d 651, 653 (2009).

[76] *Id.* at 99, 217 P.3d at 654.

[77] *Id.*

The majority characterized the State's position before the trial court and the court of appeals as asserting that the camping fee did not meet the statutory definition of "charge."[78] The court found that the State argued that the "charge" must be "money that a landowner requires a person to pay before that person is allowed access to the land, not a fee that a landowner requires a person to pay to make a particular use of the land after the person has entered the land."[79] Because the fee to camp was not a fee charged for entry or access, it did not meet the statutory definition of "charge"; therefore, the State believed it was entitled to recreational immunity.[80]

Interestingly, on appeal to the Oregon Supreme Court, the State changed its argument.[81] Rather than continue arguing that the fee did not constitute a charge to go upon the land of the State, the State contended that a different result was dictated by the inclusion of the words "the land" in ORS 105.688(2)(a).[82] The State argued that, even if the fee exacted for camping was "a charge for permission to use" Tugman Park, the charge was only for permission to use the campground, not for permission to use the trails.[83] Essentially the State's contention was that the park was, in actuality, a divided parcel and the land on which the fee was charged was not "the land" on which Mr. Coleman was injured under the meaning of ORS 105.688(2)(a).[84] The State claimed that, if the landowner does not charge to use "the land," specifically the land upon which the plaintiff is injured, the landowner will still be afforded recreational immunity.[85] In effect, the State made a divided-parcel argument, asserting that the Colemans paid to use the campground, and even if the campground was an area in which the State would not be afforded recreational immunity, Mr. Coleman was injured in the area of the park for which a charge is not imposed and, therefore, the State was still afforded recreational immunity provided under ORS 105.682(1).[86]

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 103, 217 P.3d at 654.

83 *Id.*

84 *Id.* at 99, 217 P.3d at 654.

85 *Id.* at 99–100, 217 P.3d at 654.

86 *Id.* at 103, 217 P.3d at 656.

V
HOLDING AND RATIONALE

At its most fundamental level, the outcome of this case is dependent on two issues, statutory interpretation and the determination of whether the parcel of land was divided. In support of their positions, both the majority and the dissent engaged in statutory interpretation to determine legislative intent regarding the statutory provisions at issue in the case. Not surprisingly, the majority and dissent arrived at different conclusions regarding the meaning of the statutes and whether the State had proffered evidence that the parcel was divided.

A. Majority Opinion

The Oregon Supreme Court held that the State charged for permission to use the park, and, therefore, the State was not entitled to summary judgment based on recreational immunity.[87] Justice Walters, writing for the majority, considered whether the State had demonstrated on summary judgment that it qualified for recreational immunity because it "ma[de] no charge for permission to use *the land*."[88] In so doing, the court reversed the Oregon Court of Appeals regarding the recreational immunity defense and remanded for further proceedings on the loss of consortium claim.[89]

1. Statutory Interpretation

Ultimately the Oregon Supreme Court discredited the court of appeals' rationale. In so doing, the court began its analysis in the same place the court of appeals began its analysis.[90] The court found that "charge" means "the admission price or fee asked by an owner in return for permission *to enter* or *go upon* the owner's land."[91] The court also noted that the parties agreed that "the camping fee was not an 'admission price' and was not 'in return for permission to enter' the park."[92] Like the Oregon Court of Appeals, the court had to consider "whether the camping fee [was] a fee to 'go upon' the state's

[87] *Id.* at 96, 217 P.3d at 652.

[88] *Id.* at 99, 217 P.3d at 654 (quoting OR. REV. STAT. § 105.688 (2005)).

[89] *Id.* at 104, 217 P.3d at 656.

[90] *Id.* at 100, 217 P.3d at 654.

[91] *Id.* (quoting OR. REV. STAT. § 105.672(1) (2005)).

[92] *Id.*

land."[93] In examining the court of appeals' analysis, the court interpreted the court of appeals' decision as stating that "the legislature intended to preclude immunity for a landowner that exacts a *fee to enter* its land to use that land for a recreational purpose, but to grant immunity to a landowner that exacts a *fee for that recreational use*."[94]

The majority continued, explaining that the court of appeals' rationale did not reflect legislative intent.[95] In conducting its analysis under the framework established in *PGE v. BOLI*, the court looked only to the text and context of the statutes,[96] deeming it unnecessary to consult the legislative history.[97] The court found that the immunity was intended to be provided to landowners for allowing any person to *use* the land for recreational purposes.[98] The court held that the landowner's immunity "arise[s] out of 'the *use* of the land for recreational purposes.'"[99] "[I]t is the landowners' permission to use and the public's use that give rise to recreational immunity . . . ."[100] Therefore, it would be illogical to interpret the legislative intent to disregard fees exacted for permission to use or for the public's actual use in imposing limitations on the application of recreational immunity.[101]

To further support its holding, the court noted that the words following "charge" in ORS 105.688(2)(a) were "for *permission to use*."[102] The word "charge" does not exclude fees charged for permission to use land; therefore, the text of the statute suggests that the word "charge" "include[s] fees exacted for use of land as well as fees exacted for entry to land."[103] In addition, the court pointed to the fact that "a person moves over or on land when he or she enters the land, but a person also moves over or on land when he or she makes

93 *Id.*

94 *Id.* at 101, 217 P.3d at 655.

95 *Id.*

96 *Id.* at 100, 217 P.3d at 655.

97 *Id.* at 100 n.4, 217 P.3d at 654 n.4.

98 *Id.* at 101, 217 P.3d at 655.

99 *Id.* (second alteration in original) (quoting OR. REV. STAT. § 105.682(1) (2005)).

100 *Id.*

101 *Id.*

102 *Id.* (quoting OR. REV. STAT. § 105.688(2)(a) (2005)).

103 *Id.*

use of that land for recreational purposes."[104] The court continued, stating that "'charge' encompasses both fees to enter land and fees to use land as long as that use entails moving over or on the land for a recreational purpose."[105] The court further bolstered its position by referring to the way that ORS 105.688(2)(c) interacts with paragraph (a) of the same statute. Paragraph (c) states that the "recreational immunity applies only if '[t]he owner *charges* no more than $75 per cord for permission to *use* the land for woodcutting.'"[106] The court continued by illustrating that, when read together, "to qualify for immunity, a landowner must impose *no* fee to enter or use its land, except a fee of less than $75 per cord to use the land for woodcutting."[107] In the court's opinion, if the legislature had wanted to grant immunity to landowners who charge minimal fees for recreational use other than cutting wood, the legislature certainly could have done so.[108]

In summarizing its rationale, the court stated that "[a] person moves over and on the land to camp on it, and camping is a recreational purpose. Therefore, the state made a charge for permission to use Tugman Park and thus forfeited recreational immunity."[109] The fact that the activity engaged in at the time of the injury was not the activity for which the fee was exacted is irrelevant.[110] If a landowner is entitled to recreational immunity under ORS 105.682(1), that "immunity extends as long as the injured person's principal purpose for entry is recreational, even if the person was engaged in other nonrecreational activity at the time of injury."[111] ORS 105.688(2)(a) was interpreted similarly.[112] To retain their immunity, landowners "must make *no* charge for permission to use the land."[113] Where a landowner charges to use the land, immunity does not apply, even if the injury occurs while the user is engaged in some activity other than that which was the basis for the

104 *Id.*

105 *Id.* at 102, 217 P.3d at 655.

106 *Id.* at 102, 217 P.3d at 655 (alteration in original) (quoting OR. REV. STAT. § 105.688(2)(c) (2005)).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 102, 217 P.3d at 656.

113 *Id.*

charge to use the property.[114] In short, where a "landowner makes a charge to use a park for camping, the landowner forfeits its immunity, even if a camper is injured while biking" outside the campground but within the confines of the park.[115]

2. Consideration of the State's New Argument

In analyzing the State's new argument, that the land Mr. Coleman was injured on is not the land for which a fee was imposed, the majority examined the meaning of the term "land" as it is used in the applicable statutes. The court found that "land" is a statutorily defined term, meaning "all real property, whether publicly or privately owned."[116] In support of its position, the State contended that "real property" includes both the entire parcel of land as well as any distinct piece of land within that parcel.[117] Further, the State argued that the use of the article "the" by the legislature was indicative of "the legislature condition[ing] immunity on a landowner's making no charge for use of 'the' distinct part of the land on which the injury occurred."[118] While the majority acknowledged the potential for the State's argument, it determined that there was no need to address the issue in the present case.[119] The court held that the State did not establish on summary judgment that there were two distinct pieces of land with identifiable boundaries, one of which was open to the public for free and the other which allowed access only to those who paid to use it.[120] Further, the State did not establish that, as campers, the plaintiffs were limited to using only the land for which the charge was imposed.[121]

In summary, after conducting its statutory construction analysis, the court determined that the fee charged for camping was a fee to go upon the land of the State. Because the State did not proffer evidence below that the land was distinctly divided into multiple portions, the court did not consider the issue. As such, the court determined that

114 *Id.*

115 *Id.* at 102–03, 217 P.3d at 656.

116 *Id.* at 103, 217 P.3d at 656 (quoting OR. REV. STAT. § 105.672(3) (2005)).

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 103–04, 217 P.3d at 656.

121 *Id.* at 104, 217 P.3d at 656.

the land was an undivided parcel; therefore, a fee to use one portion of the parcel constituted a charge to use the land as a whole. The court's decision not to consider whether the parcel was divided effectively avoided one of the most outcome-determinative issues in the case.

B. Dissenting Opinion

Justice Balmer dissented and was joined by Justices Kistler and Linder. The dissent disagreed with the majority regarding whether the immunity applies to the entire parcel of land or only the portion of the parcel for which the fee is paid. The dissent also arrived at a different conclusion regarding whether the State established below that the land at issue was a divided parcel.

1. Statutory Interpretation

On the issue of statutory interpretation, the dissent characterized the majority's opinion as holding that, "if a landowner charges a fee for the use of one part of its land, the landowner may not assert recreational use immunity as to a user who pays the fee, even for injuries that occur on other land that is open for recreational use without any charge."[122] The dissent continued, stating that the statutory language does not support the majority's interpretation and that such an interpretation "will significantly limit the immunity that the legislature intended to confer on landowners."[123] Further, the dissent claimed that such an interpretation will also lead to "anomalous results."[124] While the dissent disagreed with the majority's holding that a fee charged to use Tugman Park for camping precludes application of recreational immunity to the entire park, it did concede that the word "charge" was correctly interpreted to include fees for entering or using land as long as the use entails moving over or on the land for a recreational purpose.[125]

In conducting its own statutory construction analysis, the dissent found language in two statutes particularly revealing in reaching its determination that a fee imposed for the use of one portion of a parcel did not constitute a waiver of the immunity for the remaining portions of the parcel. First, the dissent noted the wording of ORS 105.682(1),

[122] *Id.* at 104, 217 P.3d at 657 (Balmer, J., dissenting).

[123] *Id.* at 104–05, 217 P.3d at 657.

[124] *Id.* at 106, 217 P.3d at 657.

[125] *Id.* (quoting majority opinion at 101–02).

which states that immunity is provided for an injury "that arises out of the use of *the land* for recreational purposes, . . . when the owner of land either directly or indirectly permits any person to use *the land* for recreational purposes."[126] Second, the dissent noted the language of ORS 105.688(2)(a), which provides that the immunity applies only when "the owner makes no charge for permission to use *the land*."[127] In conducting its statutory interpretation, the dissent read these statutes to mean that, if a landowner charges to use one part of his land, the immunity is not available for an injury that arises from recreational use of that portion of the land.[128] However, where an injury occurs on the portion of the land that was not paid for, the immunity is available to protect the landowner.[129] The dissent continued, "[t]he legislature's use of the definite article 'the' suggests that the legislature did not intend the immunity (or lack of immunity) to apply to *all* land that may be owned by a landowner, but rather to some specific part of the landowner's land."[130]

2. Consideration of the State's New Argument

Upon consideration of the State's new argument, the dissent found the argument—that the State did not charge to use "the land" upon which Mr. Coleman was injured, and it was thus entitled to the benefit of recreational immunity—to be persuasive.[131] Finding statutory support for limiting the immunity waiver in both undivided- and divided-parcel cases, the dissent then turned to discrediting the majority's rejection of the State's new claim.

The dissent stated that there was no basis for the majority's conclusion that the land was not divided into two distinct parcels.[132] The dissent pointed to the fact that, while the plaintiffs were entitled to use the entire park due to their status as campers, they would have been able to use all areas of the park, other than the campground, even without paying a fee.[133] As members of the nonpaying public,

126 *Id.* at 106, 217 P.3d at 658 (alternation in original) (quoting OR. REV. STAT. § 105.682(1) (2005)).

127 *Id.* (alteration in original) (quoting OR. REV. STAT. § 105.688(2)(a) (2005)).

128 *Id.*

129 *Id.*

130 *Id.* at 107, 217 P.3d at 658.

131 *Id.* at 106, 217 P.3d at 657–58.

132 *Id.* at 108 n.6, 217 P.3d at 658 n.6.

133 *Id.* at 108, 217 P.3d at 658–59.

the plaintiffs would have been able to use the trails upon which Mr. Coleman was injured in the exact same way as patrons paying for a campsite.[134] In what is the dissent's most valid argument, the dissent explained that to hold as the majority did allows for the anomalous conclusion that the State may assert the recreational immunity against a person who is injured in Tugman Park if he is not paying to camp, but it may not assert the immunity against a person paying to camp who is injured in the same place, under the same circumstances.[135] Further, the dissent believed that the statutes did not require the land to be subdivided through the use of notices, signs, or fences.[136] Despite this fact, the maps submitted to the trial court demonstrated that the campground was a separate area from the trails, complete with "a registration booth at the entry point, showers, and restrooms."[137]

In summary, after conducting its own statutory construction analysis, the dissent determined that a charge imposed to use one portion of a parcel does not preclude recreational immunity from being applied to the other portions of the parcel, regardless of whether the parcel is divided or not. Under the dissent's interpretation of legislative intent, whether the State established that the parcel was divided was irrelevant.

VI

IMPLICATIONS

A. Majority and Dissenting Opinion Analysis

Both the majority and the dissent present plausible interpretations of the legal issues presented in this case, but despite their best efforts, both the majority's holding and the dissent's opinion create some issues of their own. The majority's position appears proper in undivided-parcel cases. Where the parcel is truly undivided, a fee imposed to use one portion of the parcel should waive the immunity as to the entire piece of land. The trouble with the court's holding is that the dissent correctly characterizes this as a divided-parcel case. While what constitutes sufficient division of a piece of land is not currently defined, it is hard to imagine how a piece of land separated

134 *Id.* at 108, 217 P.3d at 659.

135 *Id.*

136 *Id.* at 109, 217 P.3d at 659.

137 *Id.*

into two portions, one of which requires a fee for use while the other does not, can be held to be an undivided parcel. It appears that the court avoided a critical issue in this case by not considering whether the land was a divided parcel.

1. Concerns with the Majority Opinion

As has already been alluded to, one significant flaw exists with regard to the majority opinion, and it is directly related to the debate over whether the land in the present case is a divided parcel or not. The dissent calls attention to the fact that the majority opinion may provide for anomalous results where parcels contain separate portions but are treated as an undivided whole. In the present case, the majority opinion allows the Colemans to recover against the State because they paid to use one portion of an undivided parcel and were injured while using the other portion that was open to the public without charge. Conversely, a person using only the free portion of the parcel who was injured in the same place and in the same manner would not be allowed to recover for their injuries due to the State's ability to invoke recreational immunity. While the statutes appear to support the dissent's characterization of how a case involving a plaintiff who was not charged a fee would be resolved, it is unclear what the majority's rationale is in allowing for such an anomaly.

An alternative reading of the statutes indicates that the immunity may be waived even where the plaintiff did not pay to use the land. The statutes merely state that the immunity is waived where a landowner charges for use of the land. The statutes do not require that the landowner charge the particular plaintiff to constitute a waiver of the recreational immunity, just that they charge for use of the land. Under this interpretation of the statute, in an undivided-parcel case where the landowner charges for use of one portion of the land, that charge constitutes a waiver as to the whole parcel, whether the user is the one paying the charge or not. Essentially the waiver would attach to the land rather than to the individual paying to use the land. Under this reading of the statutes, the majority's holding no longer leads to the anomalous results suggested by the dissent. The fact that the State charged people to use a portion of the parcel would result in the State waiving the recreational immunity for the entire parcel for any person using the land for recreational purposes. Admittedly, the 2007 revisions to ORS 105.672(1) call this interpretation into question. Under the revised statute, "charge" is

defined as "the admission price or fee requested or expected by an owner in return for granting permission for *a person* to enter or go upon the owner's land."[138] This change in the statutory language seemingly clarifies whether the immunity is precluded as to any user or only to one who has paid to use the land.

Regardless of how the statutes are interpreted, the anomalous results described by the dissent would be resolved if the land in the present case was held to be a divided parcel. Given this understanding, the simple solution to resolve this issue in similar cases is for landowners to clearly separate the portions of their land for which a fee is imposed and the portion that a user may enjoy for free. While this solution appears simple, what will constitute sufficient notice of a divided parcel remains unclear.

2. Concerns with the Dissenting Opinion

The dissenting opinion presents two troubling issues of its own. First, the dissent's statutory interpretation rested on the notion that, if the legislature intended the statutes to have the meaning given to them by the majority, it could have explicitly stated such an intent. Second, the immunity should be applied to free portions of land in non-delineated divided-parcel cases.

The dissent indicated that the majority's holding regarding a fee for one portion of the land waiving immunity for the entire parcel is not supported by legislative intent. Essentially, the dissent argued that, if the legislature desired such an outcome, it could have explicitly worded the statutes to reflect this intent. However, the dissent failed to acknowledge that its argument suffers from the same problem. The dissent stated that the legislature's use of the word "the" reflects its desire to have the immunity waived only to "that" particular portion of the parcel for which a fee was paid. The dissent's reading of the statutes, while plausible, is subject to debate. Applying the same rationale the dissent used to discredit the majority's statutory interpretation, the legislature could have used the word "that" as opposed to "the," as the dissent did in its explanation of its statutory interpretation. In the opinion of the majority, the use of the words "the land" implies the entire parcel of land. If, as the dissent suggests, the legislature intended the immunity to apply only to the portion of the parcel for which a fee was paid, the legislature could have dictated

[138] OR. REV. STAT. § 105.672(1) (2007) (emphasis added).

that the immunity was waived only for "that land" for which the fee was paid.

The dissent also stated that the statutes do not require any form of demarcation between portions of the land requiring payment of a usage fee and portions that are free. While the statutes do not explicitly require overt divisions of land, such a holding would create incredible ambiguity. Where parcels of land are not clearly delineated, as was the case here, how can application of the immunity be determined after the fact? How would a landowner ever know what portion of their land was afforded the immunity and what portion could be subject to liability? Admittedly, where land is clearly divided between the parcel for which a fee is required for entry or use and a parcel which does not require a fee, the dissent's position is tenable. In fact, the majority opinion explicitly states that there may be some merit to this argument. However, where use of one portion of land unencumbered by fees stems from use of a portion of land for which there is a fee, the dissent's rationale appears more tenuous.

On balance, the majority's holding as to the application of the immunity to truly undivided parcels appears correct. The majority opinion falters in its analysis, or lack of analysis, regarding whether the parcel at issue in the present case was divided. As a result, the court's analysis is misapplied given the facts of the case. Where the parcel is divided, the immunity should apply only where a fee is not imposed for the portion of land used for recreational purposes.

B. Application of the Recreational Immunity After Coleman

1. What Will Be the Effect of Divided Land?

Going forward, where a piece of land is definitively divided into two portions, one requiring a usage fee and one not requiring a fee, how will the recreational immunity be applied? The immunity should apply to the portion of the land not requiring payment of a usage fee and should not apply to the portion for which a landowner charges a usage fee. Applying this approach to the facts in the present case, if the portions of the park were clearly delineated between the fee-charging campground and the free hiking trails, Mr. Coleman could recover for his injuries if sustained in the campground, but the State could assert the recreational immunity if his injuries occurred on the hiking trails outside of the camping area. Such an application

provides for equitable results regardless of whether the plaintiff is a paying user of the land.

The majority alluded to the fact that a single parcel of land that is clearly divided into two or more parcels may be dealt with differently under similar circumstances. It is suggested that if the land is divided and the injury occurs on the portion of the land for which a fee was not paid, the landowner may still be able to assert the recreational immunity despite charging for use of an attached but clearly delineated portion of the same parcel of land. There is no question regarding the dissent's position on this issue. The dissent definitively states that, in cases where the land is divided, whether such division is readily apparent or not, the immunity should apply to the portion of the parcel for which payment for entry or use was not made and should be precluded as to the portion of the parcel for which payment was required.

Although it is not binding, given the strength of the dissent's argument and the majority's apparent inclination toward recognizing applicability of the immunity in divided-parcel cases, it is likely that subsequent cases involving divided parcels will be decided differently. In future cases courts will likely find that the recreational immunity is available where a person is injured while on property that he or she did not have to pay to enter or use, even where the person had to pay to enter or use an attached but clearly delineated portion of land. The apparent implication for landowners allowing recreational use of their land is to unmistakably demarcate the areas for use of which a fee is imposed and the areas that may be used without charge.

While a different outcome is likely in future cases involving divided parcels, allowing immunity in divided-parcel cases will create a new issue. The courts will have to devise a way to determine if a parcel is clearly divided and, if it is not, what characteristics suggest that such a division exists despite a lack of visual cues. While courts frequently make decisions on such subjective determinations, a new body of law will have to develop to help courts determine what constitutes enough visual notice that the land is divided, and where such notice is not overtly provided, what attributes constitute constructive notice that such a division exists. Shaping this new body of law will take time, as it is likely that new tests will be articulated and new precedent will need to be developed.

2. How Will Use Permits Be Addressed?

While it is evident that charges imposed by parks for entry or for camping where the camping area is not clearly delineated from the rest of the park undoubtedly preclude invocation of the recreational immunity under the rule announced by the Oregon Supreme Court in *Coleman*, the effect of other fees indirectly charged to use a park is not as obvious. An example of such an indirect fee charged to use a park is a "use permit." Many parks in the state of Oregon are "free" to use but require the purchase of a statewide use permit. The user of any of these parks must purchase a use permit, which entitles them to use any of the parks that have adopted that particular permit for some specified period of time, often one or two years. To enjoy any of the parks, the user does not have to pay any additional fee but must display the appropriate permit. Use permits present the question of whether the permit fee, or some portion thereof, constitutes a charge to use the parks.

One illustration of parks that require use permits are Off-Highway Vehicle (OHV) parks such as Browns Camp and Millican Valley. These parks allow off-road motor vehicle traffic. Users are not required to pay to use a specific park, but they must purchase an Oregon All-Terrain Vehicle (ATV) Permit to be able to use their vehicles in these parks.[139] While the pass allows use of all such OHV parks across the state for a two-year period and the user is not paying an additional fee imposed for the use of any single park in particular, the question arises of whether the fee for the permit will constitute a "charge" for use of the park.

Similarly, many parks in the state of Oregon require a day-use fee that seems to clearly fall within the province of immunity preclusion. An alternative to paying such day-use fees at individual parks is to purchase an annual "Northwest Forest Pass," which entitles the purchaser to avoid paying the day-use fees at some parks and trailheads. Like purchasers of the Oregon ATV Permit, purchasers of the Northwest Forest Pass are not paying for the use of a particular park, but are paying for the right to use any of the parks that honor the pass. Again, the question arises of whether or not the purchaser has been indirectly charged for use of the honoring park.

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[139] Or. Parks & Recreation Dep't, ATV Permits (Aug. 23, 2010), http://www.oregon.gov/OPRD/ATV/Permits.shtml.

Use permits, such as the Oregon ATV Permit and the Northwest Forest Pass, should constitute a fee for use of the state's land. In the case of the Oregon ATV permit, one uses such OHV parks solely for recreation involving use of motor vehicles. Therefore, paying for the permit is essentially a requirement of using the park. While purchasing the permit is admittedly not required to go upon the land of the park, it is required to use the park for its intended purpose. This makes it similar to the charge imposed for camping in the present case, as it was a fee imposed to use the land for its intended purpose rather than a fee incurred for merely entering or going upon the state's land. The Northwest Forest Pass similarly, and more clearly, seems to be a charge to go upon the state's land. After all, the pass is just a proxy for the day-use fee that the purchaser would have paid had the pass not been purchased.

While such a holding seems proper, the implications are vast. An injury occurring at these OHV parks from vehicle rollovers, collisions, passenger ejections, or any number of other accidents would subject the state to liability. Likewise, liability may be imposed on the state where an injury to a Northwest Forest Pass purchaser occurs in a park honoring the pass. Admittedly, there would still have to be a basis for the claim, such as negligence, but this seems to be an unreasonably low bar given the circumstances likely to surround the incident.

CONCLUSION

The court's holding in *Coleman* has vast implications regarding the liability of both private and public landowners who make their property available for public use. The court's holding seems appropriate in the context of an undivided-parcel case, but it appears to sidestep a critical factor in this case. The dissent's opinion correctly states that the parcel of land at issue in the present case is a divided parcel. As such, the majority's holding that the fee constituted a charge for use of the land and that the land was part of the same undivided parcel is improper. Additionally, the court's decision leaves significant issues unresolved. Issues such as divided property and indirect "charge" assessment remain outstanding. For the time being, the Oregon Supreme Court's decision should alter the layout of private and public lands open to the public for recreational use. Landowners of such land, including the state's parks, should unmistakably delineate areas for which a fee is charged for entry or

use and clearly distinguish and separate those areas for which no fee is required.